In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 592

HELEN SCOTT FAIRBANKS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 87-101) are reported at 15 T. C. 62. The opinion of the Court of Appeals (R. 118-122) is reported at 191 F. 2d 680.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1951. (R. 122.) A petition

for rehearing was filed October 9, 1951, and was denied on November 19, 1951. (R. 123.) The petition for a writ of certiorari was filed on February 16, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the alimony payments received by taxpayer in 1942 and 1943 were properly includible in her gross income for those years, under Section 22(k) of the Internal Revenue Code.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The pertinent parts of the statute and other authorities involved are set forth in the Appendix, *infra,* pp. 10-15.

STATEMENT

This case involves an asserted deficiency in personal income and victory tax for the calendar year 1943. The facts as stipulated by the parties (R. 13-84, 85-86), and as found by the Tax Court (R. 88-94), may be summarized as follows:

Prior to November 26, 1938, taxpayer was the wife of Frederick C. Fairbanks. On or about November 22, 1938, Frederick C. Fairbanks and taxpayer entered into an agreement settling property rights. This agreement was made binding upon the assigns, executors and administrators of the parties. It recited that the parties were separated and had been living apart for several years and

that Frederick C. Fairbanks had filed a suit for divorce in Nevada in which the taxpayer had entered an appearance and that the action was pending; that the parties desired to settle and adjust their respective property rights and to make provision for the support of taxpayer during the remainder of her life. (R. 88-89.) Frederick C. Fairbanks agreed to place certain securities in escrow to assure monthly payments to the taxpayer (R. 90). Both parties bound themselves and their heirs, assigns, administrators and personal representatives to execute at any time all agreements necessary to carry out this agreement (R. 89).

The First Judicial District Court of the State of Nevada, in its decree granting taxpayer an absolute divorce on November 26, 1938 (R. 88), approved, confirmed and adopted the agreement between Frederick C. Fairbanks and taxpayer dated November 22, 1938, and reserved jurisdiction to increase or decrease the amount of the monthly payments provided by the agreement to the extent provided therein. (R. 91)

Frederick C. Fairbanks remarried, and on January 16, 1940, placed certain of his properties, including the securities referred to in the agreement of November 22, 1938, in a trust the beneficiaries of which were his children and the then wife Dorothy Fairbanks (R. 19, 50, 82). The trust was revocable during Frederick C. Fairbanks' life, but became irrevocable upon his death. Reference was

made in the trust instrument to the obligation to taxpayer. (R. 91-92.)

Frederick C. Fairbanks died on May 22, 1940, and his estate was probated in the Probate Court of the County of Marion, State of Indiana. (R. 88.) Taxpayer filed a claim against the Estate of Frederick C. Fairbanks for the value of the monthly payments due her for support, predicated on the agreement of November 22, 1938, settling property rights. (R. 92.) On July 5, 1941, the executors of the estate entered into an agreement with taxpayer which was approved by the Probate Court of Marion County, Indiana, under which taxpayer was to continue to receive monthly payments for her support. (R. 92.) The agreement of July 5, 1941, was one which the parties thereto were obligated to make under the terms of the agreement of November 22, 1938, as an agreement required for the purposes of giving full force and effect to the 1938 agreement; and it was supplemental to the 1938 agreement. It was required in order to provide a method for determining the amounts of the monthly payments after the death of Frederick C. Fairbanks. (R. 94.)

Taxpayer received $13,500 during the year 1942 and $14,815.13 during the year 1943. (R. 93.) She did not report any of these amounts as income. (R. 93.) The Commissioner determined a deficiency in her tax return on the ground that these amounts were includible in her taxable income under Sec-

tion 22 (a) and (k) and Section 171, Internal Revenue Code. (R. 10.) The Tax Court sustained the Commissioner's deficiency determination. (R. 94-101.) The Court of Appeals affirmed the Tax Court and held that these amounts were taxable to taxpayer. (R. 118-122.)

ARGUMENT

1. The Court of Appeals was correct in determining that the alimony payments received by the taxpayer were taxable as income. It seems plain that the power to tax "incomes, from whatever source derived" without apportionment under the Sixteenth Amendment (Appendix, *infra,* p. 10)[1] includes the power to tax amounts received by a divorced wife from her husband directly, out of the income from trusts created wholly or partly for her benefit, or from the husband's executors, where such amounts represent the discharge of obligations to the wife arising from the marriage relationship. The Court of Claims has explicitly so held (*Mahana* v. *United States,* 88 F. Supp. 285,

[1] Actually Congress has plenary power to tax under Article I, Section 8 of the Constitution. This power to lay and collect taxes is "exhaustive and embraces every conceivable power of taxation." *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 12. The Sixteenth Amendment was adopted not to limit this plenary power, but to make clear that the *source* of income is not material and that a tax on income from property was not to be regarded as the equivalent of a tax upon the property itself with the attendant necessity for apportionment, etc., as had been held in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601.

certiorari denied, 339 U.S. 978), and, before the statute here involved was passed, this Court indicated that Congress had ample power to devise a "statutory formula" for the taxation of alimony payments either to the husband or the ex-wife. *Pearce* v. *Commissioner,* 315 U.S. 543, 547. By Sections 22(k) and 171 of the Internal Revenue Code (Appendix, *infra,* pp. 10, 12-13), Congress exercised that power by taxing the ex-wife in the circumstances prescribed in those sections.[2]

2. These statutory provisions were properly applied in this case. The Tax Court correctly construed the 1941 agreement as a supplement to the 1938 agreement, carrying out the obligation of the earlier agreement to make monthly payments to the taxpayer for the remainder of her life. (R. 99.) In this connection, it is important to note that the 1938 agreement bound the executors and trustees (R. 25) and required them to execute such further agreements as were required to give full force and effect to its terms (R. 24). Thus a supplemental agreement was required to determine and provide the monthly payments which the taxpayer was to receive after Frederick C. Fairbanks' death, and the 1941 agreement did precisely that. On

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[2] Section 120 of the Revenue Act of 1942, c. 619, 56 Stat. 798, added Sections 22(k) and 171 to the Internal Revenue Code. The purposes and effect of this change were to shift responsibility for the tax on alimony and separate maintenance from husband to wife. H. Rep. No. 2333, 77th Cong., 2d Sess., p. 46 (1942-2 Cum. Bull. 372, 409).

these facts, the court below correctly affirmed the decision of the Tax Court, saying (R. 121-122):

> The Tax Court found as a question of fact that there was no surrender and no novation. The ruling is sound and the facts and the text of the document support the finding.

Thus, on the Tax Court's appraisal of the 1941 agreement as supplemental to the 1938 agreement, the payments received by taxpayer during the years in question are includible in her taxable income under Sections 22(k) and 171 of the Code.[3]

3. There are no conflicting decisions requiring resolution by this Court. *Gould* v. *Gould,* 245 U.S. 151, which the taxpayer here, like the taxpayer in *Mahana* v. *United States,* 88 F. Supp. 285 (C. Cls.), certiorari denied, 339 U.S. 978, claims is opposed to the decision below (Pet. 6-7), did not deal with the scope of the term "income" as used in the Sixteenth Amendment. It decided only that the definition of "net income" contained in Section II A and B of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, was not intended to include monthly amounts paid to a legally separated wife for her support and maintenance, the Court noting that the net income of the divorced husband subject to taxation was not decreased by payment of alimony. Thus the *Gould* case in no way implies that Con-

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[3] See *Izrastzoff* v. *Commissioner,* 193 F. 2d 625 (C.A. 2); *Laughlin's Estate* v. *Commissioner,* 167 F. 2d 828 (C.A. 9).

gress could not provide, as it has done in the present Sections 22(k) and 171, that, in certain circumstances, alimony and support payments to a divorced or legally separated wife should be included in the wife's taxable income and not in the husband's.

Nor is there any conflict with *Harris* v. *Commissioner,* 340 U.S. 106, which the taxpayer claims is opposed to the decision below (Pet. 8-9); that case involved different statutory provisions and totally different problems. *Harris* was a gift tax case involving a post-nuptial property settlement agreement (as distinguished from an agreement respecting alimony) which was approved in a divorce decree. The question in that case was whether the payments were taxable as gifts because not made for an adequate and full consideration in money or money's worth. This Court concluded that in the particular circumstances of that case the payments were made pursuant to the divorce decree rather than under the written instrument, and that Congress did not intend to tax such transfers as gifts.

The problem of the selection of the spouse who should bear the burden of the income tax on alimony payments is patently different from the question of the *Harris* case as to whether a gift tax is to be imposed at all on transfers which represent an unraveling of the spouses' property interests. Congressional intent with respect to the latter has little to do with the former, particularly since Congress has made it crystal clear that if alimony pay-

ments are not taxable to the wife, no deduction is available to the husband. Moreover, in the *Harris* case, the gift tax liability turned on whether the transfers were made pursuant to the agreement of the parties or pursuant to the divorce decree. The income tax liability of a wife under Section 22 (k), however, is not dependent on such a distinction, for that section applies with equal force to payments made pursuant to a divorce decree or pursuant to a written instrument incident to the divorce. Thus what was a crucial distinction in the *Harris* case is immaterial under Section 22 (k). The taxpayer, accordingly, is mistaken in asserting a conflict between the decision below and *Harris* v. *Commissioner,* 340 U.S. 106, as a basis for seeking review in this Court.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Special Assistant to the Attorney General.

MARCH, 1952.

APPENDIX

Constitution of the United States:

Amendment XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [as amended by Sec. 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes, gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

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(k) [as added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a

decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *

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(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

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(b) [as amended by Sec. 111 (b) of the Revenue Act of 1942, *supra*] There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the

amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

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(26 U.S.C. 1946 ed., Sec. 162.)

SEC. 171 [as added by Sec. 120 (c) of the Revenue Act of 1942, *supra*]. INCOME OF AN ESTATE OF TRUST IN CASE OF DIVORCE, ETC.

(a) *Inclusion in Gross Income.*—There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this section, would be includible in the gross income of her husband, and such amount shall not, despite section 166, section 167, or any other provision of this chapter, be includible in the gross income of such husband. This subsection shall not apply to that part of any such in-

come of the trust which the terms of the decree or trust instrument fix, in terms of an amount of money or a portion of such income, as a sum which is payable for the support of minor children of such husband. In case such income is less than the amount specified in the decree or instrument, for the purpose of applying the preceding sentence, such income, to the extent of such sum payable for such support, shall be considered a payment for such support.

(b) *Wife Considered a Beneficiary.*—For the purposes of computing the net income of the estate or trust and the net income of the wife described in section 22 (k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22 (k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included.

(26 U.S.C. 1946 ed., Sec. 171.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(k)-1. *Alimony and separate maintenance payments—Income to former wife.*—(a) *In general.*—Section 22 (k) provides rules for treatment in certain cases of payments in the na-

ture of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797 (a) (17).

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

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